In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5501

OSMUNDO RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court committed plain error in conducting a hearing on the voluntariness of his confession in the presence of the jury; that the government's failure to call a witness violated his Sixth Amendment right to confrontation; and that comments by the prosecutor in summation deprived him of a fair trial.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of three counts of conspiring to distribute and distributing cocaine in violation of 21 U.S.C. 841(a)(1) and 846 and 18 U.S.C. 2. He was sentenced to two years' imprisonment on each of the three counts, the sentences to run concurrently. He was also sentenced to a special parole term of five years. The court of appeals affirmed without opinion (Pet. App.).

The evidence at trial showed that on June 22, 1972, special agents Barry Abbot and Edward Coghlan of the Drug Enforcement Administration, while acting in an undercover capacity, went to the residence of John Osborne.[1] Their object was to arrange for the purchase of cocaine (Tr. 65-67, 306-307). At the apartment Osborne informed the agents that he could get them one eighth of a kilogram of cocaine for $2,200, which would be delivered by a Cuban friend (Tr. 67, 308).[2] Later that evening Osborne notified the agents by phone that the cocaine would be available the following day (Tr. 68, 308).

The following day at about 5:30 p.m. the agents returned to Osborne's apartment. At about 7:00 p.m. petitioner arrived and went into the kitchen with Osborne. Petitioner then produced an ounce of cocaine and gave Osborne a quarter of an ounce to sell to the agents as a sample (Tr. 69-73, 196-198, 308-311). Osborne returned to the living room and gave the sample to the agents. The agents tested it and satisfied themselves that the substance was cocaine. Petitioner then entered the living room and Osborne introduced him to the agents as "Ray." Ray assured the agents that the eighth of a kilogram would be the same quality as the sample and that he would return with it in forty-five minutes (Tr. 73-75, 198-199, 311-312). When petitioner did not return for over an hour and a half, the agents paid Osborne $100 for the sample and advised him that they had to leave and that they would contact him on June 26 (Tr. 75-76, 200-201, 312-313).

---

[1]Osborne was indicted along with petitioner. He pleaded guilty to the conspiracy count and was a witness for the government at petitioner's trial.

[2]Petitioner's wife testified that he is from Cuba (Tr. 368).

After unsuccessfully trying to contact Osborne on June 26, the agents did contact him on June 27 and arranged a purchase to be completed in two separate transactions (Tr. 79-83, 201-204, 314-316a). At approximately 8:15 p.m. the agents went to Osborne's apartment. Osborne gave them two ounces of cocaine which he had previously picked up at petitioner's shop, for which they paid $1,100 (Tr. 84-85, 204-205, 246-247, 317). This money was to be taken to petitioner whereupon he would return to Osborne's apartment with two more ounces. That was done: Osborne went to petitioner's shop and gave him the $1,100 (Tr. 183-186, 206-207), then petitioner came to Osborne's apartment with two more ounces, which were given to the agents. Upon satisfying themselves that it was cocaine, they paid Osborne another $1,100 (Tr. 87-91, 207-210, 318-321).

On July 24, 1972, petitioner was arrested by Agent Coghlan. He was advised of his *Miranda* rights at the time of his arrest and again at the office of the Bureau of Narcotics and Dangerous Drugs. Thereafter, petitioner was taken to the United States Attorney's Office where he was again advised of his rights by an Assistant United States Attorney. After indicating to the Assistant that he understood his rights, petitioner confessed to delivering the cocaine sold to Agents Abbot and Coghlan (Tr. 327-335).

Following his indictment, arraignment and plea of not guilty, petitioner moved to discover all statements made by him and in the government's possession (Gov't App. A-1).[3] Pursuant to that motion, the government provided petitioner with a copy of some handwritten notes compiled by the Assistant United States Attorney on July 24, 1972, outlining his interview with petitioner (Gov't App. A-11). Agent Coghlan, who was present at

---

[3]"Gov't App." refers to the appendix to the government's brief in the court of appeals, a copy of which has been lodged with this Court.

the interview, also prepared a report of the interview (Gov't App. A-15). On the day trial was to begin, government counsel, who was not the same attorney who had interviewed petitioner, provided defense counsel with a copy of Agent Coghlan's report. He explained that it was not produced earlier because neither he nor the interviewing attorney had been aware of its existence until shortly before trial was to begin (Tr. 9A, 18A). The trial court accepted the government's explanation, finding that there was no deliberate attempt to conceal the report, and refused to suppress the statements or enter any order for failure to comply with discovery pursuant to Fed. R. Crim. P. 16(g) (Tr. 20A).[4]

1. Agent Coghlan testified that petitioner was advised of his *Miranda* rights at the time of arrest and at the time he was brought before the U.S. Attorney (Tr. 327-329). When he began to testify concerning petitioner's statements to the Assistant United States Attorney, defense counsel requested a "voir dire" to "inquire generally about the voluntary nature of any statements * * * " (Tr. 329-321).[5] The court granted this request and defense counsel, in the presence of the jury, questioned Agent Coghlan about the circumstances surrounding the petitioner's statement to the Assistant United States Attorney

---

[4]Petitioner did not request a continuance pursuant to Rule 16(g), and, as noted, the government did provide the agent's report prior to trial.

[5]During the opening day of trial, defense counsel expressly declined to ask for a voluntariness hearing at that time. He requested instead that he be given a *voir dire* at the time any statements were to be introduced (Tr. 21A-22A).

(Tr. 331-333). Petitioner contends that the holding of the *voir dire* in the presence of the jury violated 18 U.S.C. 3501(a).[6]

At the time of the *voir dire*, defense counsel made no request that it be held outside the jury's presence. In fact, defense counsel sought to use the jury's presence to petitioner's advantage by exploring the reasons why the *Miranda* rights were explained to petitioner repeatedly, in an apparent attempt to challenge petitioner's understanding of his rights (Tr. 331-332). In light of defense counsel's failure to object to the presence of the jury, the trial court was under no duty *sua sponte* to excuse the jury. *Pinto* v. *Pierce*, 389 U.S. 31, 33; *United States* v. *Everett*, 457 F. 2d 813, 814 (C.A. 9); *Lott* v. *United States*, 445 F. 2d 858 (C.A. 9); *United States* v. *Monroe*, 437 F. 2d 684, 686 (C.A.D.C.); *United States* v. *Smith*, 418 F. 2d 1294,1295 (C.A. 5).

Significantly, this examination brought out no controverted facts or issues concerning the voluntariness of the confession. Agent Coghlan had already testified, without objection, that petitioner had been informed of his rights twice before the interview with the Assis-

---

[6]18 U.S.C. 3501(a) reads:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

tant United States Attorney and that petitioner had understood them. There was no objection on grounds of voluntariness either before or immediately after the *voir dire*. Defense counsel simply stated that he wanted to inquire generally about the circumstances of the confession. Only the next trial day, after the government had rested its case, did defense counsel move for a mistrial on the ground that the *Miranda* warnings "were not thorough enough" (Tr. 389). This motion was denied.[7] Thus, as there was no genuinely disputed fact concerning the voluntariness of the confession, and as the petitioner did not timely object to the procedure used and presumably consented to it, the court was under no duty under 18 U.S.C. 3501(a) to hold a hearing outside the jury's presence.[8]

---

[7]After the *voir dire*, defense counsel again objected to the testimony of Agent Coghlan on the ground that the government had not complied with the discovery order by withholding Agent Coghlan's report (Tr. 334). The trial court correctly overruled this objection in light of the facts that (1) defense counsel never requested any relief provided for in Fed. R. Crim. P. 16(g) other than the drastic (and unnecessary) sanction of denying the government the use of Agent Coghlan's testimony and (2) petitioner could not have been prejudiced by the inadvertently late disclosure since he had received the notes of the Assistant United States Attorney over a year prior to trial, and those notes contained the same information as Agent Coghlan's report. See *United States* v. *Knohl*, 379 F. 2d 427, 442 (C.A. 2), certiorari denied, 389 U.S. 973; cf. *Killian* v. *United States*, 368 U.S. 231, 243-244.

[8]*Jackson* v. *Denno*, 378 U.S. 368, and *Lego* v. *Twomey*, 404 U.S. 477, cited by petitioner (Pet. 6, 7), are inapposite. *Jackson* struck down the New York procedure for allowing the jury to determine the voluntariness of a confession where there are disputed facts at issue, while *Lego* v. *Twomey* concerned the quantum of proof necessary for the trial court to determine the voluntariness of a confession. The last two lines in petitioner's quotation from *Lego* v. *Twomey* (Pet. 7) suggesting that that decision requires a hearing before the judge before submission to the jury, citing 18 U.S.C. 3501(a), are not found in that opinion. In fact, the Court expressly stated that 18 U.S.C. 3501(a) was inapplicable to that case (404 U.S. at 486, fn. 14).

Assuming, *arguendo*, that the trial court should have ordered the jury excused during the *voir dire*, the error was harmless in light of the uncontroverted facts supporting the voluntariness of the confession.

2. During his opening statement, the prosecutor informed the jury that he would call a witness, unidentified at the time, who would testify concerning the direct participation of petitioner in the narcotics transactions at issue (Tr. 21). Petitioner contends that the prosecutor was referring to the Assistant United States Attorney who interviewed petitioner and that the failure to call that attorney as a witness denied petitioner his Sixth Amendment right of confrontation.

This contention is incorrect. First, the record makes it clear that the prosecutor was not referring to the Assistant United States Attorney in this portion of his opening statement. This Assistant could not testify to the *direct* participation of petitioner. Other than the witnesses named in the prosecutor's opening statement, the only other person who could testify to petitioner's direct participation was John Osborne. Osborne did, in fact, testify. Furthermore, the government was under no obligation to call the Assistant to testify. The government called Agent Coghlan, who was present at the interview when petitioner confessed, and thus effectively placed petitioner's statements into evidence. If petitioner felt it necessary to examine the Assistant concerning these events, he was free either to call the Assistant as a witness or ask the court to call the Assistant as a court witness.

3. Finally, petitioner contends that reversible error was committed when the prosecutor told the jury that if they believed the government witnesses lied then they should

acquit petitioner (Tr. 425). Petitioner's position is that the prosecutor improperly asserted that the jury was required to find that the government witnesses lied before it could bring in a verdict of acquittal.

When viewed in the context of defense counsel's summation, it is clear that the prosecutor's comments were not improper. During his summation, defense counsel repeatedly placed the credibility of John Osborne and Agents Abbott and Coghlan in question (Tr. 396-422). In response to this, the prosecutor did no more than state that if the jury believed that the government's witnesses lied they should acquit petitioner, but if they believed the witnesses told the truth they should hold petitioner accountable. Contrary to petitioner's contention, the prosecutor did not tell the jury that to acquit petitioner it was necessary to find that the agents and Osborne lied. Rather than misstating the law, the prosecutor simply and properly framed the issue of credibility.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

DOJ-1974-12